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### **Submission on proposed Co-operatives National Law.**

The Consultation Regulatory Impact Statement on the National Co-operatives Law, Co-operatives a national approach, recognises: “The State and Territory legislative framework needs to enable incorporation in a manner which recognises the Co-operative Principles of the International Cooperative Alliance. It should also take account of the United Nations resolution on supporting the development of co-operatives and be consistent with the International Labour Organisation Recommendation 193.” (pp 9-10)

The Co-operative Federation of Victoria Ltd does, however, wish to express our disappointment with the process undertaken by Consumer Affairs Victoria to ensure that all stakeholders in Victoria were aware of the proposed Co-operatives National Law. We raised the consultation process with Consumer Affairs Victoria in December 2009 and January 2010 and it was not until the 12 February 2010 that we received a formal response. It was on the 12 February 2010 that Consumer Affairs Victoria posted a consumer alert on its web site regarding the proposed Co-operatives National Law – only 14 days before submissions closed on 26 February 2010. We are not aware of or been informed about any other action by Consumer Affairs Victoria regarding the proposed Co-operatives National Law.

### **Board Meetings**

Under the proposed Cooperatives National Law (3104) Board meetings can be held using any technology consented to by the board. Member directors must form a majority of a quorum. This is supported as promoting co-operative democracy. This is the same as in the Victorian Co-operatives Act – Division part 9 Management and Administration of Co-operatives Division 1 – The Board 215 meeting of the board of directors 3 a meeting of the board of directors may be called or held using any technology consented to by the board. the consent may be a standing one.

Section 3105 (6) implies that a resolution circulated is not binding until passed at a subsequent meeting. This defeats the purpose of circulating the resolution.

### **Co-operative not Cooperative**

The documentation for the proposed Co-operatives National Law uses the word co-operative without the hyphen. This is contrary to practice in Australia and the practice of the International Co-operative Alliance. Legislative reform should not impose the word co-operative without a hyphen.

### **Co-operative Principles**

The inclusion of the co-operative principles (1301) is important and essential. There needs to be recognition, however, that the principles are internationally adopted by the International Co-operative Alliance and may change from time to time and when and if the ICA changes the principles there should result in an automatic amendment to the legislation in Australia.

### **Directors and Officers Duties and Liabilities**

Under the proposed Cooperatives National Law (3118 – 3122) there has been a draft of general duties of directors and officers to be consistent with duties and liabilities in Division 1 Part 2D.1 of the Corporations Act

Division 1 Part 2D.1 of the Corporations Act 2001 provides for general duties and liabilities that address matters such as: the care and diligence that a director or officer must use and the defenses that are available for an alleged contravention of this duty – including a set of principles known as the business judgment rule; a duty to act in good faith and for a proper purpose and a duty to not use their position improperly or to use information improperly. Co-operatives Act 1996 Division 2 Duties and liabilities of directors, officers and employees refers to 221 Officers must act honestly 223 Standard of care and diligence required and 223 Improper use of information or position. It would make sense that the general duties and officers should be made more consistent with the Corporations Act 2001 provided this was consistent with board accountability to members. Honesty (3118) and due diligence (3119) are essential to the integrity of co-operatives.

### **Disclosure Statements**

Section 2108 provides that the disclosure statement informs prospective members of the nature and extent of their financial involvement or liability as a member. The disclosure statement needs to be broader and recognise the co-operative difference and what this means to its members – including the active membership requirement.

### **Employee Directors**

Co-operatives should be able to decide whether or not they have member employee directors. Section 3103 (1) seems to assume that an employee who is a member is not eligible to be a director.

### **Federations and Associations**

Under existing State co-operative legislation, the peak bodies in NSW, Qld, Victoria and WA are recognised as Federations with individual co-operatives as members. Section 1201 Definitions defines Associations as a group of co-operatives and Federations as a group of Associations. The legislation should reflect and reinforce the current reality.

### **Financial Reporting Requirements**

Victoria's Co-operatives Act establishes requirements for financial reporting and audit. Since 23 April 2008, small co-operatives in Victoria can seek an exemption from audit requirements. This exemption does not exempt small co-operatives from the preparation and presentation of financial statements to the AGM. The application has to be made each year. It is not known how many co-operatives have sought and obtained exemptions. We have sought this information and the Registry of Co-operatives is still deciding whether or not to release the information. We also do not know what definition of a small co-operative is being applied in deciding on whether or not to grant an exemption.

The Co-operative Federation of Victoria Ltd supports that the Co-operatives National Law provides a blanket and ongoing audit exemption for small co-operatives and that this exemption should be equivalent to existing exemptions for small proprietary companies under the Corporations Act 2001 which must also recognise that co-operatives are accountable to their members and, therefore, financial statements must be prepared and presented to members. Directors must be required (3326) to present financial reports to the AGM.

It is proposed that the definition for small co-operative will be prescribed in proposed Co-operatives National Regulations and that there will be a separate consultation process for the regulations which is expected to be in 2010. A separate consultation is, of course, necessary as the Co-operatives National Regulations have not been released for public comment. It remains to be seen, therefore, whether the Regulations proposed exemptions for small co-operatives will be consistent with the exemption for small proprietary companies while recognising that co-operatives are member owned and controlled.

The Co-operatives National Law proposes that a small co-operative will only need to prepare and lodge a financial report and a directors' report if it is directed to do so by five percent of its members or by the Registrar of Co-operatives. The proposed Co-operatives National Law will also provide that a small co-operative's rules can specify reporting to members in addition to any legislative requirements or exemptions. The rules of all co-operatives should specify reporting arrangements to members and provide the framework for financial and directors' reports. What is not supported is the proposal that a minority tyranny can direct what financial and directors' reports despite the wishes of the majority of members. These tyranny provisions are redundant if co-operatives must prepare and present financial statements. Co-operatives are democratic business enterprises and in a democratic business the majority of the members prevail. Provision could be made, however, for a minority in a co-operative to take their demands for financial and directors' reports to the board of a co-operative initially and subsequently to the Registrar. At present any individual members of a co-operative can lodge requests about a co-operative to the board and/or the Registrar of Co-operatives.

## **Fines**

2518 With fines members must have the opportunity to show why the fine of any value should not be imposed.

## **Model Rules**

Under the Co-operatives National Law it is proposed that model rules do not have to be adopted but if they are they can stay as is or change as the model rule changes and individual co-operatives do not have to submit rules changes as these will automatically apply.

Co-operatives and their members need to be advised when the model rules have changes and co-operatives required to subsequently amend their rules and provide a copy of the amended rules to members.

The sector should also be consulted in the development of the model rules.

Section 2107 (3) allows the Registrar to approve a relevant model rule if it is omitted from draft initial rules submitted as required under Schedule 1. This should only occur if the Registrar has advised that the rule is missing and no action has been taken.

## **Registers**

3137 Provides co-operatives must keep a Register of CCU's issued and the names of the holders.

## **Restriction on the use of the word co-operative**

Under the proposed Cooperatives National Law **(3145 (4) and 3150)** there will be a restriction on the use of word co-operative or similar words.

While this is generally supported, we do not support a situation that would require a co-operative such as the Murray Goulburn Co-operative Co limited to cease using the word co-operative because it is not registered under any State co-operative legislation. There are recognised co-operatives incorporated under other legislation and these should continue to be recognised as co-operatives if the business is member owned and controlled in accordance with the co-operative principles.

## **Rule Changes**

In Victoria, the Co-operatives Act provides that the Registrar of Co-operatives must give prior approval to any changes to the rules. This approval must be obtained before members or the board can vote on a proposed change. If members change the approved rules, they must be resubmitted to the Registrar for approval and resubmitted to another general meeting of members.

Under the proposed Co-operatives National Law the Registrar of Cooperatives will be able to specify categories of rules which a cooperative can change without requesting approval – for these rules, the cooperative will simply notify the Registrar that the Rule has been changed. While the Registrar could

subsequently disallow a rule change which is in contravention of the Co-operatives National Law or any other law, the practice of not requiring co-operatives to seek prior approval for rule changes is supported. It is our view that the categories specified as those which cannot be changed without requesting approval should be a minimal number and that the provision in the legislation of matters for which the rules must make provision would ensure compliance with the Co-operatives National Law or any other law.

Furthermore, there is no provision in the Co-operatives National Law for how long the Registrar may take in approving proposed rule changes that require prior approval. In contrast, in Victoria, the Co-operatives Act does specify a required response period. This is necessary. When the Registrar's approval for proposed rule changes is required (2306 and 2118 (3)) the Registrar must be required to respond within a specified time period.

### **Special Resolutions**

Under the proposed Co-operatives National Law 3215 requirement to provide the Registrar with notice of a proposed special resolution has been removed. In Victoria, under the Co-operatives Act the Registrar of Co-operatives has the power to disallow a special resolution before a board puts the resolution to members and, therefore, prevent members from seeing and voting on a proposal. Currently the Victorian Act requires that a co-operative must give at least 28 days notice to the Registrar of a proposed special resolution. Under the proposed Co-operatives National Law the Registrar of Co-operatives will not have this power. The Registrar can subsequently disallow a special resolution which is in contravention of the Co-operatives National Law or any other law. Under the proposed Co-operatives National Law 3220 Decision of Registrar on application to register special resolution it will be registered if it complies with Law and is not contrary to the Law.

These changes are supported as the onus is on co-operatives to determine whether a special resolution is consistent with Co-operatives National Law or any other law. If the Registrar subsequently disallows a special resolution the reasoning for this disallowance should be provided within a specified time period.

### **Types of co-operatives**

2101 provides a cooperative may be either a distributing cooperative or a non-distributing cooperative. This is preferable for the current provision in Victoria for a trading or non-trading cooperative. In Part 2 Formation Division 1 Types of Co-operatives – Trading co-operatives and non-trading co-operatives. The current provision is misleading and promotes misunderstanding whereas the new provision is more accurate.

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